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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

FREDDIE C. TILLER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Illinois Supreme Court has incorrectly interpreted and improperly extended the rule of *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) to include a constitutional prohibition against capital punishment for one who, while possessing the intent to kill, was not shown to have overtly planned the murders or participated in the commission of the fatal acts?

II.

Whether a defendant who did not commit the fatal acts, but who was nevertheless convicted of multiple murders under a theory which requires proof of a culpable mental state, is sufficiently distinguishable from the defendant in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) to permit his execution consistent with the Eighth and Fourteenth Amendments?

III.

Whether this Court should give further consideration to the rationale for its decision in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) in light of the fact that it incorrectly concluded that the Illinois death penalty act applies only to persons found to have actually committed the fatal act?

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In The

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

FREDDIE C. TILLER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION BELOW

Following respondent's convictions in the Circuit Court of St. Clair County, Illinois, and the imposition of sentences of death, the Illinois Supreme Court affirmed two convictions for murder and one for armed robbery; reversed one conviction for armed robbery; vacated two convictions for armed violence; vacated the sentences of death; and remanded this cause with directions. *People v. Tiller*, Ill. S.Ct. No. 53260, (December 17, 1982). The opinion of the Illinois Supreme Court, which is not as yet reported, is reprinted as petitioner's Appendix A.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on December 17, 1982. Petitioner filed a timely petition for rehearing, which was denied by an order entered January 28, 1983. See Appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VIII, provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV, provides, in pertinent part, that:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

Ill. Rev. Stat. 1979, ch. 38, par. 5-2, provides that:

> § 5-2. When Accountability Exists. A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or,

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense in so defined that his conduct was inevitably incident to its commission; or

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a), provides that:

§ 9-1. Murder-Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3) and (6), provide that:

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

* * *

6. the murdered individual was killed in the course of another felony if:

(a) The murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child . . . .

STATEMENT OF THE CASE

A. Introduction—Procedural History.

On the morning of April 30, 1979, respondent Freddie Tiller, Jr., and a co-defendant, Andre Jones, while armed with a brown-handled .22 pistol, went on a robbery and shooting spree in East St. Louis, Illinois. The two robbery victims, Richard Stoltz and Samuel Nersesian, both unarmed, offered no resistance. They were shot to death, each dispatched by bullets to the head. Debra Brown, a mail carrier and unwitting intruder on the robbery of Mr. Nersesian, was shot, once in the chest and once in the mouth, and also killed.

Tiller and Jones were charged by indictment in the Circuit Court of St. Clair County with three counts each of murder, armed robbery, and armed violence. Jones pleaded guilty to three counts of murder and was sentenced to death. The convictions and two of the death sentences were affirmed. *People v. Jones*, No. 53414 December 17, 1982). (Opinion reprinted as Appendix C.) On Tiller's motion, the three counts relating to the crimes against Richard Stoltz were severed, and he was tried by a jury and convicted of all six counts (two counts each of murder, armed robbery, and armed violence) relating to Samuel Nersesian and Debra Brown. The State sought the death penalty. Pursuant to *Ill. Rev. Stat.* 1979, ch. 38, § 9-1(d), a separate jury was chosen for sentencing, and Tiller was subsequently sentenced to death.

On appeal, the Illinois Supreme Court affirmed the murder convictions, and the conviction for armed robbery of Mr. Nersesian. Relying exclusively on this Court's decision in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the court below reversed the sentences of death.

B. The Facts Underlying The Convictions.

The State's principal witness was Laurie Elem, who lived at 2121 Martin Luther King Drive in East St. Louis with Andre Jones and her three children. On April 30, 1979, at 8:00 a.m., she and Jones left to visit her cousin, Lucy Williams. (Tr. 370-373) Jones carried the murder weapon in his coat pocket that morning, and Ms. Elem testified that it was his custom to travel armed. (Tr. 373, 400, 401)

Tiller was at the Williams' residence when Jones and Ms. Elem arrived. The visit lasted approximately 45 minutes, after which Ms. Elem and Jones left, accompanied by Tiller. (Tr. 371-374, 502-503)

While walking along Bunkham Road, Tiller tried to enlist Ms. Elem's aid in a scheme to rob a dry cleaners. She refused. (Tr. 375-377) Turning off Bunkham Road, Tiller, Jones, and Ms. Elem took a circuitous route heading in the general direction of Ms. Elem's apartment. (Tr. 377) They walked some distance along a railroad track until they came to a brickyard where Ms. Elem noticed an elderly white man loading bricks onto a trailer. (Tr. 378-379) Freddie Tiller then asked Andre Jones for his gun, stating his intention to rob the man in the brickyard, and Jones gave him the gun. (Tr. 378-379, 555-556) The two proceeded toward the man in the brickyard, and Ms. Elem headed away from them toward the street. (Tr. 380)

Richard Stoltz had arrived at the brickyard an hour earlier, and was loading bricks onto a trailer. (Tr. 258, 264, 266-267) Jones and Tiller approached Stoltz, and Tiller drew the pistol and pointed it at him. (Tr. 383) Tiller then shot Richard Stoltz, the bullet entering the brain through the left eye. (Tr. 385, 318-320) When Tiller

and Jones rejoined Ms. Elem on the street, Tiller was carrying the gun, and Jones was carrying a watch and a set of keys. (Tr. 385-387, 409-410) Addressing Tiller, Jones said "Man, you shot the shit out of that honkey," to which Tiller replied "I mean business. He wouldn't up the cash." (Tr. 386-387)

After the shooting at the brickyard, Tiller, Ms. Elem and Jones continued on their way to Ms. Elem's apartment. (Tr. 390) Tiller had given the gun back to Jones who reloaded it, and the two discussed robbing the cleaners across the street from Ms. Elem's apartment. (Tr. 389-390) Tiller again tried to enlist the aid of Laurie Elem, but again Ms. Elem refused. (Tr. 390) Tiller and Jones discussed who would hold the gun, and Tiller stated that he wanted to. (Tr. 391) When they reached the cleaners on King Drive, Jones removed a ski mask from his back pocket. (Tr. 391-392) At this point, Ms. Elem left Tiller and Jones by the cleaners and went home. (Tr. 390)

The Illinois Cleaners, located on Martin Luther King Drive in East St. Louis, Illinois, was owned and operated by Samuel Nersesian and his mother, Helen Nersesian. On the morning of April 30, 1979, Samuel Nersesian was in the store alone. Since he did not survive the day, and since Jones did not testify at Tiller's trial, the only account of what took place there that morning came from Tiller. He testified at trial that he and Jones entered the Illinois Cleaners shortly after Ms. Elem went home. (Tr. 509) After waiting for a customer to leave, Jones drew the gun on Samuel Nersesian and announced a stickup. (Tr. 510) Tiller went to the back of the store and picked up a television set while Jones, still menacing Mr. Nersesian with the gun, searched the drawers behind the counter. (Tr. 510-511, 545) When Tiller came to the front of the store, he observed Debra Brown, a letter carrier

making her deliveries, approaching. (Tr. 512) He put the television down, admonished Jones not to hurt the "mail lady," and left to rejoin Laurie Elem. (Tr. 512-513) On cross-examination, Tiller admitted that he gave no such admonishment regarding Samuel Nersesian:

Q. You didn't say anything about the man?
A. The man was still . . .
Q. The man was dead, wasn't he?
A. Not as I know of, not as I know of.

(Tr. 547)

Tiller was with Ms. Elem for only a few moments before he returned to the Illinois Cleaners, where he retrieved the television, placed it in the back of the mail delivery jeep, and drove off. (Tr. 514) Evidently, both Mr. Nersesian and Ms. Brown were dead at this point.

Tiller and Jones then made a number of trips between the cleaners and Ms. Elem's apartment. When they had finished, the loot consisted of the television, a watch taken from Richard Stoltz, a quantity of cash, and some clothing. (Tr. 393-394, 412-413)

When he left Ms. Elem's apartment, Tiller drove the mail jeep to an abandoned house, where he searched through the mail and recovered a number of income tax refund checks. (Tr. 515) He then drove to his aunt's house where he met a cousin, Annette Simpson, to whom he gave two of the checks, asking that she cash them. (Tr. 515-516) Again, he drove off in the mail jeep, and eventually abandoned it on rural Route 3. (Tr. 516)

Annette Simpson succeeded in cashing a check made out to Charles Union that afternoon. (Tr. 348) Later, she encountered Tiller in downtown East St. Louis, where he told her that the checks were the proceeds of a robbery he had committed that morning in which a man and woman

were killed. (Tr. 350, 358, 364) When that information was confirmed by an independent source, Ms. Simpson went home and burned the other check. (Tr. 352, 358, 361)

The body of Samuel Nersesian was found behind the counter of the Illinois Cleaners by a patron who entered after the robbery. (Tr. 368) He had been shot twice in the head. Both wounds were contact wounds. (Tr. 425-427, 433-435) The partially unclad body of Debra Brown was found in the back of the store. She had been shot once in the chest and once in the mouth. Gunpowder burns around her mouth indicated a shot from close range. (Tr. 322, 323)

C. The Manner In Which The Constitutional Question Arose.

Approximately eight months after oral argument in *People v. Tiller*, this Court decided *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant filed a motion for leave to cite additional authority, and attached a copy of the *Enmund* opinion. The State countered with a motion for leave to file supplemental argument, and attached a memorandum of law concerning the applicability of *Enmund* to the case at bar. In reversing the death sentences, the Illinois Supreme Court found no defect under state law, but relied exclusively on *Enmund*.

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT OF THE ILLINOIS SUPREME COURT INCORRECTLY INTERPRETS AND IMPROPERLY EXTENDS THE RULE OF *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) TO INCLUDE A CONSTITUTIONAL PROHIBITION AGAINST CAPITAL PUNISHMENT FOR ONE WHO, WHILE POSSESSING THE INTENT TO KILL, WAS NOT SHOWN TO HAVE PARTICIPATED IN THE COMMISSION OF THE FATAL ACTS.

Last year, a majority of this Court concluded that the Eighth Amendment prohibition of cruel and unusual punishment precluded the imposition of the death penalty on a defendant ". . . in the absence of proof that [he] killed or attempted to kill, and regardless of whether [he] intended or contemplated that life would be taken. . . ." *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 3379, 73 L.Ed.2d 1140, 1154 (1982). The Illinois Supreme Court now concludes that the constitutional rule announced in *Enmund* extends also to one who "was not shown to have planned or participated in any manner in the killings . . ." *People v. Tiller*, No. 53260 (December 17, 1982), Appendix A at 16-17.

In vacating the sentences of death in *Tiller*, the Illinois Supreme Court relied exclusively on this Court's holding in *Enmund*, and not on any state law ground. However, while purporting to apply *Enmund*, the court below clearly did not follow it. Earl Enmund's conviction was based on a theory of vicarious felony murder, and the gist of the *Enmund* decision is that a defendant may not constitutionally be sentenced to death absent proof of a culpable mental state—the intent to kill or the intent to use lethal force if necessary to effectuate the robbery or a

safe escape. Freddie Tiller is not a felony murderer. He was convicted on the basis of his accountability for intentional murders, a theory which is conceptually distinct from felony murder. The gist of the *Tiller* decision is that the death penalty is constitutionally impermissible absent proof of some overt act contributing to the killing; for example, planning or participating.

The error below is compounded by the fact that, although Tiller was not found to have actually killed or attempted to kill Samuel Nersesian and Debra Brown, he was found to possess the requisite intent. Respondent was charged with murder under *Ill. Rev. Stat.*, 1979, ch. 38, par. 9-1(a)(1):

> (a) A person who kills an individual without lawful justification, commits murder if, in performing the the acts which cause the death:
>
> > (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another. . . .

He was found guilty of the murders, and the convictions were affirmed, under the Illinois accountability statute, *Ill. Rev. Stat.*, 1979, ch. 38, par. 5-2, which provides in pertinent part, that:

> § 5-2. A person is legally accountable for the conduct of another when: . . .
>
> > (c) Either before or during the commission of an offense, *and with the intent to promote or facilitate such commission*, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

(emphasis added). *See* Appendix A at 7. Thus, in affirming the murder convictions, the Illinois Supreme Court held that the evidence established beyond a reason-

able doubt that Tiller, "with the intent to promote or facilitate" the murders, aided and abetted his accomplice in the commission of the offenses. This fact purges Tiller's death sentences of the error found in *Enmund*. Only by grafting onto *Enmund* an additional requirement not mandated by this Court was the court below able to find cause to vacate the death sentences. Furthermore, the sentencing jury was specifically called upon to address the question of Tiller's intent, and found beyond a reasonable doubt that the two murders for which he was convicted "were the result of either an intent to kill more than one person or of separate premeditated acts . . ." *Ill. Rev. Stat.* 1979, ch. 38, par. 9-1(b)(3). The court below did not suggest that this finding lacked support in the record.

The Illinois Supreme Court has had occasion to consider the applicability of *Enmund* in two other recently decided cases: *People v. Ruiz*, No. 53415 (December 17, 1982), decided the same day as *Tiller*; and *People v. Davis*, No. 54276 (January 24, 1983) (opinions reprinted as Appendices D and E). *Ruiz* reflects a correct application of *Enmund*:

> We have detailed above the participation of Luis Ruiz in the three murders involved in this case. In *Enmund v. Florida*, the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony, robbery. In our case Ruiz was not tried or convicted on the theory of felony murder. We noted above in this opinion that, under our statute, the death penalty cannot be imposed for felony murder unless the defendant actually kills the victim. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9-1(b)(6)(a).) In our case Ruiz was present throughout the violent episode, actively participated, except for striking a fatal blow, and his conduct was such as to support an inference that he possessed the intent to take the lives of the victims.

Appendix D at 63. The majority opinion in *Ruiz* was authored by Chief Justice Ryan, who dissented in *Tiller*. *Davis* is less clear. There, the court construed *Enmund* as allowing imposition of the death penalty "on a defendant who does not himself kill 'if the likelihood of a killing in the course of a [felony] were so substantial that one should share the blame for the killing if he somehow participated in the felony.' [citation omitted] This is just such a case, and we hold that *Enmund* does not preclude imposition of the death penalty." Appendix E at 111. The author of the *Davis* opinion was Justice Moran, who also dissented in *Tiller*, writing "I fear, too, that the application of *Enmund* to the instant case sets an unfortunate precedent." Appendix A at 19. His fears were confirmed, for in writing *Ruiz* Chief Justice Ryan found it necessary to ignore *Tiller* altogether, while in writing *Davis* Justice Moran was forced to distinguish that case from *Tiller* and *Enmund* for reasons which had nothing to do with the holding of either:

> Also distinguishable from the instant case is this court's recent opinion in *People v. Tiller*, (Dec. 17, 1982), No. 53260. There defendant's death sentence was reversed in light of *Enmund*. However, in *Tiller*, the evidence indicated that defendant was not present when his codefendant murdered one of the two victims. Here defendant was present and it is clear that he must have contemplated that lethal force would be employed by Richard Holman. Finally, the defendant in *Tiller* was convicted of two related murders. The deaths occurred at virtually the same time, in the same place, and arose out of the same incident. In our case, the defendant was convicted of three separate murders.

Appendix E at 111-2. Thus, by its erroneous holding in *Tiller* that *Enmund* requires proof of planning or participating in the fatal acts, the Illinois Supreme Court

was forced, only one month later, to add the further requirement of close proximity to the scene at the time of the killing. What further additions to *Enmund* may become necessary in the future in order to ameliorate the error in *Tiller* must be a matter of grave concern to this Court, and, indeed, one warranting the issuance of a writ of certiorari.

II.

ALTHOUGH RESPONDENT DID NOT COMMIT THE FATAL ACTS, HE WAS NEVERTHELESS CONVICTED OF MULTIPLE MURDERS UNDER A THEORY WHICH REQUIRES PROOF OF A CULPABLE MENTAL STATE, AND THUS, THIS CASE IS SUFFICIENTLY DISTINGUISHABLE FROM *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) TO PERMIT RESPONDENT'S EXECUTION CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

In writing for the majority in *People v. Ruiz*, Chief Justice Ryan noted that "In *Enmund v. Florida*, the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony robbery. In our case, Ruiz was not tried or convicted on the theory of felony murder." Appendix D at 63. Neither was Freddie Tiller. Tiller was charged under sub-paragraph (a)(1) of the Illinois murder statute with intentional murder, and, even though he was not the "triggerman," his convictions were affirmed based on paragraph 5-2(c) of the accountability statute, because he was found to possess the requisite intent. He was not the vicarious felony murderer that Earl Enmund was.

Neither was he a defendant who, like Enmund, ". . . somehow participated in a robbery where a murder occurred . . ." *Enmund*, ... U.S. ....., 102 S.Ct. at 3374, 73 L.Ed.2d at 1148. The evidence established that prior to the

robbery/murders at the Illinois Cleaners, Tiller asked Jones to give him the gun for the purpose of robbing Richard Stoltz. He then shot and killed him because "he wouldn't up the cash." It was Tiller who suggested robbing the Illinois Cleaners, and it was Tiller who tried to get Laurie Elem to assist. He watched as Jones reloaded the gun, and then told Jones that he wanted to hold the gun during the robbery. As the court below noted, the evidence supported the conclusion that the victims were murdered as part of the robbery scheme, to prevent them from identifying Tiller and Jones. Appendix A at 7.

This Court, in *Lockett v. Ohio*, 438 U.S. 596 (1978) made the observation that the states ". . . have the authority to make aiders and abettors equally responsible, as a matter of law, with principals . . ." 438 U.S. at 602. That a convicted murderer may constitutionally be executed, even though he was not the "triggerman," is therefore beyond dispute. The emphasis in both *Enmund* and *Lockett* is that the sentencing decision must be individually tailored, and must reflect the degree of the defendant's culpability. *Enmund* establishes the minimum: that there must be proof of a culpable mental state regarding the murders in order to satisfy the Eighth Amendment. With respect to this crucial element, *Tiller* bears no resemblance to *Enmund*.

As this Court noted, only a few of the jurisdictions which have death penalty statutes restrict the imposition of that punishment to persons who actually commit the fatal act. *Enmund*, ... U.S. ....., 102 S.Ct. at 3373, 73 L.Ed.2d at 1147-48, n. 9. In Illinois alone, three cases involving death sentences for "non-triggermen" have been decided since December, 1982. Accepting this case for review will provide this Court with an opportunity to further define, by contrast, the rule of *Enmund*.

III.

FURTHER CONSIDERATION OF THE RATIONALE FOR THE DECISION IN *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) IS NECESSARY IN LIGHT OF THE FACT THAT THIS COURT INCORRECTLY CONCLUDED THAT THE ILLINOIS DEATH PENALTY ACT APPLIES ONLY TO PERSONS FOUND TO HAVE COMMITTED THE FATAL ACT.

In deciding the Eighth Amendment question presented in *Enmund*, this Court observed that its judgment "'should be informed by objective factors to the maximum possible extent.' [*Coker v. Georgia*, 433 U.S. 584, 592 (1977)]." Toward that end, this Court examined, as it did in *Coker*, "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made. . . ." *Enmund*, ... U.S. ....., 102 S.Ct. at 3372, 73 L.Ed.2d at 1146. Two of the conclusions reached by the majority as a result of this analysis bear further consideration in light of the judgment of the Illinois Supreme Court in the case at bar.

The first is this Court's conclusion that the Illinois death penalty act precludes capital punishment for all except those found to have actually killed the victim. *Enmund*, ... U.S. ....., 102 S.Ct. at 3373, 73 L.Ed.2d at 1148, n. 9. In reaching this conclusion, the Court looked to the felony murder provision and aggravating factor (b)(6). *Ill. Rev. Stat.* 1979, ch. 38, pars. 9-1(a)(3), (b)(6).[1] How-

[1] These sections provide, in pertinent part:

§ 9-1. Murder-Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: . . .

(Footnote continued on following page)

ever, in so doing, this Court overlooked the intentional murder provision and aggravating factor (b)(3) which, when read in conjunction with the accountability statute, *Ill. Rev. Stat.* 1979, ch. 38, par. 5-2 can produce a different result.[2] Indeed, subsequent to this Court's decision in

[1] *continued*

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child.

[2] *Ill. Rev. Stat.* 1979, ch. 38, pars. 9-1(a)(1), (b)(3), and 5-2(c), provide as follows:

§ 9-1(a). A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another . . .

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is

(Footnote continued on following page)

Enmund, the Illinois Supreme Court affirmed the imposition of death sentences on two defendants, based on aggravating factor (b)(3), because they had been held accountable for intentional murders; *People v. Ruiz, supra*, and *People v. Davis, supra*. It bears repeating at this point that Freddie Tiller was found guilty of multiple murders, and was sentenced to death, on the same basis. Perhaps more important, though, is the fact that the result reached in *Enmund* was based, at least in part, on a conclusion regarding the scope and effect of the Illinois death penalty act that was demonstrably incorrect.

The second point addressed by this Court in *Enmund* which warrants further consideration is the conclusion that sentencing juries have almost universally rejected the death penalty for Enmund-type defendants. This Court found that of the 796 inmates on death row as of October 1, 1981 (among them, Freddie Tiller), only Enmund and two others had been sentenced to die "absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim." *Enmund*, ... U.S. ....., 102 S.Ct. at 3375-3376, 73 L.Ed.2d at 1150. Thus, if the Illinois Supreme Court is correct in holding that *Enmund* precludes

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[2] *continued*

substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or . . .

§ 5-2. A person is legally accountable for the conduct of another when:

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

the death penalty for Freddie Tiller, then the ranks of Enmund-type defendants swell by 33 percent, from 3 to 4. Future state court decisions relying on *Tiller* may enlarge the ranks even more, and, at some point jeopardize the whole foundation for the *Enmund* rule.

It is with this dilemma in mind that petitioners urge this Court to further consider and clarify its holding in *Enmund* by issuing a writ of certiorari to the Illinois Supreme Court in the case at bar.

CONCLUSION

WHEREFORE, petitioners, the People of the State of Illinois, pray that this Court issue a writ of certiorari to the Supreme Court of Illinois and, upon consideration, reverse the decision of that court thereby reinstating the death sentences given respondent.

Respectfully submitted,

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